Constitutional Limitations on the Exemption of Real Property from Taxation

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At this writing, the supreme court and the general assembly are at odds over the power of the latter to exempt real property from taxation. The court holds that the legislature is limited by Article XII, Section 2 of the Constitution to exempting "burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose,"[1] but the legislature is not disposed to agree.

At its regular session last year the 98th General Assembly took issue with the court by exempting real estate belonging to public housing authorities from taxation when used for slum clearance and/or public housing[2] under the state housing authority law,[3] notwithstanding that the court had already decided (1) that under a similar, but less forthright, law[4] such property could not be exempted as public property used exclusively for a public purpose,[5] and (2) that the right to exempt real estate from taxation is limited to the classes enumerated in Section 2 of Article XII.[6] Evidently the legislature was not in the mood to back down.

The exempting of property from taxation is an incident of the taxing power vested in the general assembly by Article II, Section 1.[7] It is aptly described in Article XII, Section 2 as "the general power * * * to determine the subjects and methods of taxation and exemptions therefrom." Subject only to limitations contained in the state and federal constitutions, the free exercise of the power is within the sole discretion of the legislature.

Under the Ohio Constitution of 1802, the only limitations on the taxing power were a prohibition against poll taxes and the require-

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1 Youngstown Housing Authority v. Evatt, 143 Ohio St. 268 (1944); Hospital Service Association v. Evatt, 144 Ohio St. 179 (1944); Zangerle v. Cleveland, 145 Ohio St. 347 (1945); New Orphans Asylum v. Board of Tax Appeals, 150 Ohio St. 219 (1948).

2 Amended House Bill No. 179, 98th General Assembly.

3 OHIO GEN. CODE §§ 1078-29 to 1078-50 (1938).

4 OHIO GEN. CODE § 1078-36, as effective immediately prior to October 6, 1949.

5 Dayton Housing Authority v. Evatt, 143 Ohio St. 10 (1944).

6 Youngstown Housing Authority v. Evatt, 143 Ohio St. 268 (1944).

7 Wasson v. Commissioner, 49 Ohio St. 622, 635 (1892).

ment of equal protection of the laws.[8] In all other respects the authority of the legislature was absolute. This condition continued for almost fifty years, but with the passage of time abuses crept in[9] and with the adoption of the present Constitution in 1851, legislative discretion in matters of taxation and tax exemption was drastically restricted.

The strongest curbs were contained in Article XII, Section 2, which then read as follows:

> Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money; but burying grounds, public schoolhouses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property, to an amount not exceeding in value two hundred dollars, for each individual, may, by general laws, be exempted from taxation; * * * .

The plain intent of this section was to cut off practically all of the legislature's discretionary powers. All property was required to be subjected to ad valorem taxation by uniform rule. Nothing was to be exempted except specified classes of property. All that was left for the general assembly to do was to fix the rate, impose the taxes and, if it chose, provide for the specified exemptions. A contemporaneous opinion in the case of *Exchange Bank of Columbus v. Hines* said that:[10]

> The manifest effect of this constitutional provision, is to make *property* the basis, and the *sole* basis, of taxation. And the object being equality and fairness, it requires, by a true interpretation:
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> 1. That the taxes shall be assessed on *all* property in the state, except the subjects of the specified exemptions.
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> 2. That the taxes shall be assessed on all property, by a *uniform rule*. And,
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> 3. That all taxable property shall be taxed at its *true value in money*.

For more than three quarters of a century the section remained in substantially the same form. It was amended in 1905, 1912 and 1918 but the restraints on the legislature were not relaxed. In 1905, a provision was added, making the bonds of the state and its subdivisions tax-exempt and by the 1912 amendment the phrase "institutions of purely public charity" was changed to "institutions used

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[8] Hill v. Higdon, 5 Ohio St. 243, 245 (1855); Zanesville v. Richards, 5 Ohio St. 590, 592, 593 (1855).

[9] Exchange Bank v. Hines, 3 Ohio St. 1, 12 (1853).

[10] See Note 9, *supra*, at p. 11.

exclusively for charitable purposes." Other changes of a minor nature were made but legislative discretion remained shackled.

It was not until 1929 that the reins on the general assembly were loosened. In that year the "classification amendment" was adopted by the electors "to provide for a more flexible system of taxation for the state and to protect property against excessive taxation according to value."[11] For those purposes, Article XII, Section 2 was amended to read as follows:

> No property, taxed according to value, shall be so taxed in excess of one and one-half per cent[12] of its true value in money for all state and local purposes, * * *. Land and improvements thereon shall be taxed by uniform rule according to value. All bonds * * * shall be exempt from taxation, and without limiting the general power, subject to the provisions of article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, * * *.

The adoption of the amendment evidenced a drastic change in public sentiment. Whereas in 1851 the voters had made it mandatory for the general assembly to pass laws taxing all forms of property by uniform rule and had left only the fixing of the rate to legislative discretion, in 1929 they voted to limit the amount of taxes that could be levied on any property and left everything else to the discretion of the general assembly, subject only to the requirement that real property be taxed by uniform rule. In other words, the legislature was back where it was before 1851 except for having to observe the uniform rule in taxing real estate and the 15 mill limitation in taxing all property.

By the omission of the former requirement that all forms of property be taxed, the amendment likewise restored the discretionary authority of the legislature to grant exemptions, but it was not until 1937 that the supreme court had the opportunity to gauge the extent of the restoration. At first glance it appeared more extensive to the court than it has since. In the opinion of Judge Matthias (Chief

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[11] The amendment was proposed by the 88th General Assembly. The question of its adoption was submitted to the electorate, pursuant to House Joint Resolution No. 8, in the following form:

> "Shall article XII, section 2 of the constitution of the state of Ohio be amended and article XII, section 3 of the constitution of the state of Ohio be repealed so as to provide for a more flexible system of taxation for the state and to protect property against excessive taxation according to value?"

[12] Article XII, Section 2 was amended again in 1933 but only by changing the words "one and one-half per cent" to "one per cent."

Justice Weygandt and Judges Jones, Day, Zimmerman, Williams and Myers concurring) in *State,* ex rel. *Struble v. Davis*[13], it was said that:

> It is to be observed that, while Section 2 of Article XII authorizes certain exemptions recited in the provision prior to its amendment, in substantially the same language as it then read, it now very significantly provides: ' * * * without limiting the general power, subject to the provisions of Article I of this Constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed to exempt burying grounds,' etc. As amended, the Constitution itself now provides that the enumeration of certain classes of property which may be exempted does not take away or limit authority of the Legislature to make other exemptions. Thus, while the uniform rule was retained as to real estate, full and complete plenary power to otherwise classify property for taxation and determine exemptions therefrom apparently was restored substantially as it had existed under the provisions of the Constitution of 1802.

Apparently the court thought at the time that the amendment removed all of the restrictions on the taxing power (including the granting of exemptions) previously contained in Article XII, Section 2 except the uniform rule, which was made to apply only to real estate. However, the *Struble* case involved the validity of a statute exempting personal property and the court decided only that "the power of the General Assembly to determine the subjects and methods of taxation and exemption of personal property is limited only by Article I of the Constitution of the state [equal protection]."

Six years later, a change in the court's estimate of the authority of the general assembly to exempt real property was forecast in *Ursuline Academy v. Board of Tax Appeals*[14]. The case involved the exemption of realty but was decided on grounds other than the power of the legislature to grant the exemption. The question was raised, however, and in the opinion announced by Judge Turner and concurred in by Judges Matthias, Hart and Zimmerman, it was observed that: [15]

> The *Struble* case was limited to the exemption of personal property, no real estate being involved. Furthermore, the exemption there in question was contended for under legislation passed subsequent to the amendment. This legislation had for its purpose the classification of personal property. The instant case instead of involving personal property only is limited to real property. For reasons that

[13] 132 Ohio St. 555, 560, 9 N.E. 2d 684 (1937).

[14] 141 Ohio St. 563, 49 N.E. 2d 674 (1943).

[15] See Note 13, *supra,* at p. 570.

> will follow we do not deem it necessary at this time to determine whether this last-mentioned amendment of Section 2 of Article XII in respect of exemption applies as well to real property.

This was the first indication of a retreat from the position taken in the *Struble* case. The dissenting opinion of Judge Bell, with which Chief Justice Weygandt concurred, contained the even more significant statement that: "The power to exempt property from taxation is granted by Section 2, Article XII of the Ohio Constitution * * *." This was something new. It had never before been doubted that tax exemptions are part and parcel of the taxing power vested in the legislature by Article II, Section 1.[16]

Finally, in *Youngstown Metropolitan Housing Authority v. Evatt*,[17] the Court came out with it. Writing for the majority of the court (Chief Justice Weygandt, and Judges Matthias, Hart and Turner) Judge Bell said that:

> The Constitution of this state grants to the General Assembly authority to pass general laws exempting from taxation certain specified classes of real property.
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> Section 2, Article XII of the Constitution reads as follows: '* * * General laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal * * *.'
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> This provision is a limitation upon legislative power to grant exemptions * * *.

This statement was not necessary to the court's decision. The case involved the exemption of a housing project under a statute, Ohio General Code, Section 1078-36, enacted after the adoption of the classification amendment which declared that property of a housing authority should "be deemed public property for public use." The statute contained no express provision for the exemption of the property. Exemption was sought under Section 5351, which exempts, *inter alia*, "public property used for a public purpose." Exemption was denied by the court on the ground that the property was not used for a public purpose, notwithstanding the declaration of the general assembly. However, in the majority opinion, Judge Bell remarked that:

> Section 1078-36, General Code, properly construed, we think discloses a legislative intention to declare property acquired, owned, leased, rented or operated by the housing authority to be deemed public property for public use for

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[16] *Cf.* Zangerle v. Cleveland, 145 Ohio St. 347, 351, 61 N.E. 2d 720 (1945).

[17] 143 Ohio St. 268, 274, 55 N.E. 2d 122 (1944).

> the purposes of public inspection and accounting only and not for the purpose of exemption from taxation.
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> This conclusion is fortified by the fact that in both the 94th and 95th General Assemblies bills were introduced to amend Section 1078-36, General Code, and to provide therein for the exemption from taxation of such property. The General Assembly declined to pass either bill. (94th General Assembly, House Bill 500; 95th General Assembly, House Bill 91.)

Far from agreeing with the conclusion, the 98th General Assembly amended Section 1078-36[18] in 1949 so that it now provides that:

> All property, both real and personal, acquired or owned by the housing authority and used for the purpose of exercising the powers set forth in the housing authority law shall be public property used exclusively for a public purpose within the meaning of article XII, section 2, of the constitution, and shall be exempt from all taxation, * * *.

This action made up the issues between the general assembly and the court. By amending the statute the legislature affirmed its conviction that the use of real estate for slum clearance or public housing under the housing authority law is a public use of the property within the meaning of Article XII, Section 2, notwithstanding the opinion of Judge Hart to the contrary (Chief Justice Weygandt and Judges Matthias, Bell and Turner concurring) in *Dayton Metropolitan Housing Authority v. Evatt.*[19] Furthermore, by specifically exempting the property from taxation rather than by relying on Section 5351 as it had before, the general assembly asserted its authority to exempt the real estate under the taxing power despite the decision in *Youngstown Metropolitan Housing Authority v. Evatt, supra,* and subsequent cases[20] that Article XII, Section 2 "is a limitation upon legislative power to grant exemptions."

The reaction of the general assembly to the limiting of its powers by the court is interesting but not decisive. The legislature is entitled to draw its own conclusion as to the uses and purposes of property which it wishes to exempt from taxation, but its views are not binding upon the court. They are entitled only "to great respect," as Judge Hart put it in the *Youngstown Housing Authority* case. Also, in the final analysis, the court has the power "to determine * * * whether the extreme boundary of legislative power has

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[18] Amended House Bill No. 179.

[19] 143 Ohio St. 10, 53 N.E. 2d 896 (1944).

[20] Hospital Service Association v. Evatt, 144 Ohio St. 179 (1944); Zangerle v. Cleveland, 145 Ohio St. 347 (1945); New Orphans Asylum v. Board of Tax Appeals, 150 Ohio St. 219 (1948).

been reached and passed."[21] For the time being, at least, the question of the authority of the general assembly to grant tax exemptions is settled and the law is summed up in the syllabus in *Zangerle v. Cleveland,* in these words: [22]

> 2. The power of the General Assembly to exempt real property from taxation is limited to the kinds and classes enumerated in Section 2, Article XII of the Constitution.
> 3. The power of the General Assembly to determine the subjects and methods of taxation and exemption of personal property is limited only by Article I of the Constitution. (State, ex rel. Struble v. Davis et al., Tax Comm., 132 Ohio St., 555, approved and followed.

The court has given no explanation for the abrupt reversal of its original appraisal of the effect of the classification amendment on the power of the legislature to exempt real estate. It prepared the way by noting in the *Ursuline Academy* case that the precise question had not been decided in the *Struble* case but a matter of such importance as the construction of a constitutional provision so as to limit a legislative power seems deserving of more attention than it has received. In the *Youngstown Housing Authority* case, in which it was first decided that Article XII, Section 2 still limits the power of the legislature to exempt realty, notwithstanding the classification amendment, the majority opinion merely says that:

> In construing constitutional and statutory provisions relating to exemption of property from taxation, there are two schools of thought, one that such provisions should be liberally construed, the other that they should be strictly construed.
> By the decisions it is established in Ohio that exemption statutes are to be strictly construed, it being the settled policy of this state that all property should bear its proportionate share of the cost and expense of government; that our law does not favor exemption of property from taxation; and hence that before particular property can be held exempt, it must fall clearly within the class of property specified in the Constitution to be exempt.
> The foundation upon which that policy rests is that statutes granting exemption of property from taxation are in derogation of the rule of uniformity and equality in matters of taxation. (See 38 Ohio Jurisprudence, 853, Section 114.)

This statement by Judge Bell of the taxing policy of the state seems to represent the taxing philosophy of the court. The Chief Justice, who had joined in the opinion in the *Struble* case, and Judge Matthias, its author, both concurred in Judge Bell's opinion as

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[21] Board of Education v. State, 51 Ohio St. 531, 540 (1894).

[22] See note 15, *supra.*

did Judges Hart and Turner, who were elected to the court after the *Struble* decision. Judges Zimmerman and Williams, both of whom had concurred in the *Struble* opinion, dissented without writing an opinion. However, the basis of their dissent undoubtedly was that the housing project was used exclusively for a public purpose, and therefore came within the limitation prescribed by the other members of the court. Judge Zimmerman had written dissenting opinions to that effect in *Dayton Housing Authority v. Evatt* and in *Columbus Housing Authority v. Thatcher*[23] both judges concurred in Judge Turner's opinion, in which it was assumed that Article XII, Section 2 limits the power of the general assembly to exempt real estate.

The flaw in Judge Bell's statement is that it utterly ignores the radical change made in the language of Section 2 of Article XII by the classification amendment. After quoting the provision of the section authorizing the legislature to exempt certain classes of real estate, Judge Bell went on to say that:

> This provision is a limitation upon legislative power to grant exemption and first made its appearance in the Constitution of 1851. Although the wording has been slightly changed by three amendments thereto in the years 1912, 1929 and 1933, the classes of property which the General Assembly was authorized to exempt by general laws has remained the same.

The vital words immediately preceding the provision to which Judge Bell referred,—"and without limiting the general power * * * to determine the subjects and methods of taxation or exemptions therefrom"—were passed over in silence. The fact that the mandatory language,—"Laws shall be passed, taxing by a uniform rule * * * [all forms of property] * * *, according to its true value in money,"—was eliminated from the section was referred to as a "slight change." In brief, the opinion leaves the impression that the court had not heard of the classification amendment and was referring to Article XII, Section 2 as it had been between 1851 and 1929.

The fact is that the taxing policy referred to by Judge Bell was scrapped in 1929. It can no longer be "the settled policy of this state that all property should bear its proportionate share of the cost and expense of government" when the only tangible personal property subject to ad valorem taxes is such as is used in business or agriculture. There is no "uniformity and equality" when taxable personal property is taxed at many different rates; and it can no longer be said that "our law does not favor exemptions"

[23] 140 Ohio St. 38, 42 N.E. 2d 437 (1942).

when there is no express requirement that the legislature tax any particular form of property. About all that was left of the pre-1929 Section 2 of Article XII is the requirement that land and improvements thereon be taxed by uniform rule. Uniformity, however, does not import universality. Uniformity refers to the tax rate and the method of assessment.[24] Universality was achieved prior to 1929 by the requirement that: "Laws shall be passed taxing [all forms of property]", but there is no longer any such requirement in the Constitution.

These considerations prompt the thought that the court was on sounder ground in the *Struble* case than it has been since. In that case it faced and gave full effect to the phrase: "and without limiting the general power, subject to the provisions of article 1 of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed to exempt burying grounds," etc., in the *Youngstown Housing Authority* case and since, it has scrupulously avoided any reference to the phrase. The court's present opinion of the meaning of Article XII, Section 2 seems to be based only upon its notion of a proper taxing policy. If that is the case, then the court has seriously encroached upon the power of the legislature.

[The following note was received from the Author while the article was at the press. Ed.]

Since the foregoing was written the majority of the court (Chief Justice Weygandt and Judges Hart, Matthias, Turner and Zimmerman) has continued to hew to the line that the general assembly is limited to exempting real property of the kinds and classes specified in Article XII, Section 2,[25] but the newcomers on the bench, Judges Stewart and Taft have taken the opposite view.

In the *University of Cincinnati* and *Cleveland Board of Education* cases the statutes in question were unconstitutional in the view of the majority as exceeding the limitations contained in Section 2 of Article XII, but the votes of Judges Stewart and Taft were to the contrary and the validity of the statutes, although badly shaken, was upheld.[26]

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[24] Miller v. Korns, 107 Ohio St. 287, 295 (1923).

[25] Cleveland v. Board of Tax Appeals, 153 Ohio St. 97, 91 N.E. 2d 480 (1950); *In re* University of Cincinnati and Cleveland Board of Education v. Board of Tax Appeals, 153 Ohio St. 142, 91 N.E. 2d 502 (1950).

[26] Article 2, Section 4 of the Constitution provides in part that: "No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, * * *."